The Obligation of Self-Restraint in Undelimited Maritime Areas*

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Abstract

As recent developments between Japan and China in the East China Sea show, unilateral activities in undelimited maritime areas can give rise to tension. Articles 74(3) and 83(3) of the United Nations Convention on the Law of the Sea (UNCLOS) provide an obligation for the States concerned not to jeopardize or hamper reaching of the final agreement ("the obligation of self-restraint"). However, the extent to which the obligation prohibits unilateral activities has been a subject of discussion. This article addresses this issue by mainly examining the relevant case law of international courts and tribunals. It finds that a consistent standard for distinguishing permissible and impermissible activities is yet to be developed, but there is a noticeable trend where the obligation of self-restraint is increasingly viewed as an obligation not limited to refraining from specific types of activities that could be identified in general and in the abstract. The article further addresses questions concerning the appropriate responses to be taken by coastal States in the face of a violation of the obligation of self-restraint by another State, including whether the compulsory dispute settlement procedure of UNCLOS could be invoked against a State that has made an optional exception declaration under Article 298(1)(a) of UNCLOS.

Introduction

China has been accelerating its resource development activities in the East China Sea. To date, it has built 16 offshore structures near the geographic equidistance line between Japan and China, on the Chinese side of the line.[1] The government of Japan has expressed regret over China's unilateral pursuit of development and has requested China to cease all unilateral development activities, as the exclusive economic zone (EEZ) and the continental shelf is yet to be delimited between the two States.[2] As this situation illustrates, unilateral activities have frequently given rise to tension, in maritime areas subject to overlapping claims to EEZs and continental shelves by more than two parties and where the maritime boundary is yet to be agreed (hereinafter referred to as "undelimited maritime areas").

The United Nations Convention on the Law of the Sea (UNCLOS) provides that, pending agreement on the delimitation of the EEZ and continental shelf, "the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during the transitional period, not to jeopardize or hamper the reaching

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1 Ministry of Foreign Affairs of Japan, *Diplomatic Bluebook 2018* (Ministry of Foreign Affairs, 2018), p. 58.

2 Ministry of Foreign Affairs of Japan, *The Current Status of China's Unilateral Development of Natural Resources in the East China Sea* (https://www.mofa.go.jp/a_o/c_m1/page3e_000356.html).

of the final agreement" (Articles 74(3) and 83(3)). In other words, with respect to undelimited maritime areas, the States concerned have an obligation to: 1) make efforts to enter into provisional arrangements; and 2) not to jeopardize or hamper the reaching of a final agreement. The second obligation is often referred to as the "obligation of self-restraint," as it requires the States concerned to practice a certain degree of self-restraint in their behavior.[3] Unilateral activities in undelimited maritime areas raise the question of whether they are in breach of the obligation of self-restraint.

It is not a simple matter to determine what kinds of activities constitute a violation of the obligation of self-restraint. For some time, the only precedent in which an international court or tribunal directly addressed the obligation of self-restraint was the award rendered in 2007 by the Arbitral Tribunal constituted under Annex VII of UNCLOS, in the maritime delimitation dispute between Guyana and Suriname. The subsequent discussion concerning the obligation of self-restraint has revolved around the criteria given in the arbitral award. More recently, the Special Chamber of the International Tribunal for the Law of the Sea (ITLOS) addressed the obligation of self-restraint in the case concerning the delimitation of the maritime boundary between Ghana and Côte d'Ivoire (Provisional Measures Order of 25 April 2015 and Judgment of 23 September 2017). Focusing mainly on the two cases, this article will examine the issues regarding the obligation of self-restraint and the measures that could be taken against a breach of the obligation. Because the two cases concerned the development of oil resources, which is also at issue between Japan and China, this article will focus primarily on the obligation of self-restraint as it relates to the development of oil and mineral resources.

1. The Obligation of Self-Restraint in International Case Law

There is general consensus that the intent of the obligation of self-restraint in undelimited maritime areas is not to prohibit all unilateral activities pending delimitation.[4] In the first place, the text of Articles 74(3) and 83(3) of UNCLOS envisages certain activities taking place. During the drafting of the Convention, some States proposed that a moratorium be placed on resource exploration and development in undelimited maritime areas. However, this proposal was not accepted, and the present text was eventually adopted.[5] The question, therefore, is as follows: of the unilateral activities not based on provisional arrangements that are undertaken in undelimited maritime areas, how do we distinguish activities that constitute a violation of the obligation to exercise self-restraint from those that do not?

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3 It should be noted that the obligation as provided under the Convention is an obligation for States concerned to "make every effort not to jeopardize or hamper the reaching of the final agreement." Caution is required not to draw any inferences from the term "obligation of self-restraint" itself, which is used in this article as a shorthand and is not a term actually used in the Convention.

4 Satya N. Nandan and Shabtai Rosenne (eds.), *United Nations Convention on the Law of the Sea: A Commentary* (Martinus Nijhoff, 2002), Vol. II, p. 984; Alexander Proelss (ed.), *United Nations Convention on the Law of the Sea: A Commentary* (Beck/Hart/Nomos, 2017), pp. 578–579, 663; Yumi Nishimura, "Nicchū tairikudana no kyōkai kakutei mondai to sono shori hōsaku" [The issue of delimitation of the continental shelf between Japan and China and the ways for its resolution], *Jurist*, No. 1321 (2006), p. 55.

5 Youri van Logchem, "The Scope for Unilateralism in Disputed Maritime Areas," in Clive H. Schofield et al. (eds.), *The Limits of Maritime Jurisdiction* (Martinus Nijhoff, 2013), pp. 179–181; Akio Morita, "Keisō kaiiki ni okeru katsudō no kokusai hōjō no hyōka—nicchū nikkan kan no shomondai wo tegakari toshite" [Assessing activities in disputed maritime areas under international law: various issues between Japan and China, and Japan and South Korea], in Sōji Yamamoto et al. (eds.), *Kaijō hoan hōsei—kaiyōhō to kokunaihō no kōsaku* [The Law and Institutions of Maritime Security: the interaction between the law of the sea and domestic law] (Sanseidō, 2009), p. 392.

(1) Guyana/Suriname Case

The dispute between Guyana and Suriname concerned the delimitation of their territorial seas, EEZs and continental shelves, as well as the development of petroleum resources pending delimitation. The dispute was referred to an Arbitral Tribunal constituted under Annex VII of UNCLOS. In the maritime area disputed by the two States, Guyana had granted several private companies permission to engage in oil exploration. One of the companies was CGX Resources Inc. of Canada, whose oil rig encountered an incident in which it was ordered by the Suriname's navy to leave the area (the "CGX Incident"). Suriname claimed that Guyana had violated the obligation of self-restraint by authorizing exploratory drilling to be undertaken in the disputed area; Guyana claimed that the conduct of the Surinamese navy was in violation of the same obligation, and also constituted a threat of force in breach of the Charter of the United Nations.

As a general matter, the Arbitral Tribunal stated that unilateral activities can be undertaken in disputed maritime areas without provisional arrangements, so long as the activities in question do not have the effect of jeopardizing or hampering the reaching of a final agreement.[6] Further, the Tribunal adopted the view that activities that cause physical change to the marine environment are not permitted unless undertaken pursuant to a provisional arrangement, because they would cause permanent change and ultimately jeopardize or hamper the reaching of a final agreement. Activities that did not result in physical change, on the other hand, were to be generally regarded permissible.[7] Based on this standard, the Arbitral Tribunal decided that Guyana's granting of exploratory drilling was a violation of the obligation of self-restraint. At the same time, it concluded that allowing seismic testing did not constitute such a violation in the circumstances at hand.[8]

The Arbitral Tribunal stated that the distinction based on physical change to the marine environment is consistent with the jurisprudence of international courts and tribunals on interim measures.[9] In particular, the Arbitral Tribunal cited the decision of the International Court of Justice (ICJ) in the Aegean Sea Continental Shelf case. In that case, Greece requested interim measures ordering Turkey to refrain from exploration activities in the disputed maritime area.[10] The ICJ ultimately declined to indicate interim measures, pointing out that Turkey's actions did not create a risk of irreparable prejudice to the rights claimed by Greece's for the following three reasons: 1) the seismic exploration did not involve any risk of physical damage to the seabed; 2) the activity in question was of a transitory character and did not involve the establishment of installations; and 3) no suggestion had been made that Turkey has engaged in operations involving actual appropriation or other use of the natural resources in question.[11] The Arbitral Tribunal in the Guyana/Suriname case considered that the standard for issuing interim measures, which is whether a given activity causes irreparable prejudice to the rights of a party, is more rigorous than the standard for the obligation of self-restraint, which concerns whether a certain activity jeopardizes or hampers the reaching of a final agreement. Therefore, the Tribunal considered that the decision of the ICJ based on the test of physical damage is relevant in its

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6 Arbitral Award Constituted Pursuant to Article 287, and in Accordance with Annex VII, of the United Nations Convention on the Law of the Sea in the Matter of an Arbitration Between Guyana and Suriname, Award of the Arbitral Tribunal (17 September 2007), *Reports of International Arbitral Awards*, Vol. XXX, pp. 131–132 (paras. 465–466).

7 Ibid., p. 132 (para. 467).

8 Ibid., p. 137 (paras. 480–481).

9 Ibid., pp. 132–133 (paras. 468–469).

10 *Aegean Sea Continental Shelf Case (Greece v. Turkey)*, Order of 11 September 1976, *ICJ Reports 1976*, pp. 5–6 (para. 2).

11 Ibid., p. 11 (para. 30); *Guyana/Suriname* Award, *supra* note 6, p. 132 (para. 468).

determination of what kinds of activities constitute a violation of the obligation of self-restraint.[12]

The arbitral award in the Guyana/Suriname case is generally understood to have indicated a certain standard, namely, (permanent) physical change to the marine environment, as permissible limits for unilateral activities in undelimited maritime areas.[13] However, some authors have cautioned against overgeneralization of this standard.[14] In particular, it has been pointed out that even in the context of seismic exploration, the knowledge obtained through exploration could jeopardize or hamper the reaching of a final agreement or cause irreparable harm to the sovereign rights of another party.[15] Moreover, the arbitral award itself was not entirely clear about the scope of unilateral activities that do not violate the obligation of self-restraint. The award stated that, as a general rule, unilateral activities that do not cause physical change to the marine environment "generally" would not violate the obligation of self-restraint.[16] However, in its more detailed findings in relation to the facts of case, the Arbitral Tribunal referred to the fact that both countries had given permission for seismic exploration to be undertaken, and that no objections were raised from the other side. It was on this basis that the award reached its conclusion that, "in the circumstances at hand," unilateral seismic testing did not violate the obligation of self-restraint.[17] It can be observed that the Arbitral Tribunal did not only take into account the nature of the activity, but also the context of the dispute in the undelimited maritime area, including the attitudes of the States concerned. This may be regarded as only natural, as the obligation of self-restraint is concerned with the reaching of a final agreement. However, in contrast to the fact that the award included some general standards concerning the obligation of self-restraint focused on the nature of the activity, it did not articulate a general framework that reflects all the considerations that were taken into account.

(2) Ghana/Côte d'Ivoire Case

The Ghana/Côte d'Ivoire case involved a dispute regarding the delimitation of their territorial seas, EEZs and continental shelves, and unilateral activities undertaken by Ghana in the disputed maritime area pending delimitation. The dispute was referred to the Special Chamber of ITLOS. Ghana had been conducting oil exploration and exploitation activities on the Ghanaian side of the equidistance line in the dispute maritime area. In regard to Ghana's activities, Côte d'Ivoire requested the Special Chamber to "to declare and adjudge that the activities undertaken unilaterally by Ghana in the Ivorian maritime area constitute a violation of the obligation not to jeopardize or hamper the conclusion of an agreement, as provided for by article 83, paragraph 3,

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12 Ibid., p. 133 (para. 469)

13 Yasuhiko Kagami, "Keisō kaiiki de no katsudō—gaiana tai surinamu kaiyō kyōkai kakutei jiken" [Activities in disputed maritime areas: case concerning the maritime boundary between Guyana and Suriname], in Akira Kotera et al. (eds.), *Kokusaihō hanrei hyakusen* [One Hundred Selected International Law Cases] (2nd edition) (Yūhikaku, 2011), p. 77.

14 British Institute of International Comparative Law (BIICL), Report on the Obligation of States under Articles 74 (3) and 83 (3) of UNCLOS in Respect of Undelimited Maritime Areas (BIICL, 2016), pp. 25–26; David Anderson and Youri van Logchem, "Rights and Obligations in Areas of Overlapping Maritime Claims," in S. Jayakumar et al. (eds.), *The South China Sea Disputes and Law of the Sea*, (Elgar, 2014), p. 220.

15 Kagami, *supra* note 13, p. 77; Naoya Okuwaki, "Kyōkai mikakutei kaiiki no kankatsuken" [Jurisdiction in undelimited maritime areas], in Shinya Murase and Jun'ichi Etō (eds.), *Kaiyō kyōkai kakutei no kokusaihō* [International Law of Maritime Boundary Delimitation] (Tōshindō, 2008), p. 173; BIICL, *supra* note 14, pp. 25–26; Stephen Fietta, "Guyana/Suriname," *American Journal of International Law*, Vol. 102, No. 1 (2008), pp. 127–128.

16 *Guyana/Suriname* Award, *supra* note 6, p. 132 (para. 467).

17 Ibid., p. 137 (para. 481).

of UNCLOS."[18] In addition, Côte d'Ivoire sought provisional measures that would require Ghana, *inter alia*, to suspend all existing oil exploration and exploitation activities and to refrain from granting new permits.[19]

In response to Côte d'Ivoire's request for provisional measures, the Special Chamber declined to order the suspension of ongoing exploration and exploitation activities, and prescribed an order principally requiring Ghana to ensure that no new drilling takes place.[20] The Special Chamber did accept that Côte d'Ivoire's rights to explore and exploit resources were at least plausible, that Ghana's ongoing exploration and exploitation activities would result in a modification of the physical characteristic of the disputed area, and that acquisition and use of information about the resources of the disputed area would create a risk of irreversible prejudice to the rights claimed by Côte d'Ivoire.[21] However, the Special Chamber considered that an order suspending ongoing activities would entail the risk of considerable financial loss and could cause harm to the marine environment. It was therefore considered not appropriate to order the suspension of all exploration and exploitation activities.[22]

In its judgment on the merits, the Special Chamber found that Ghana's unilateral exploitation activities were not in violation of the obligation of self-restraint. Firstly, the judgment noted that Ghana ultimately complied with the provisional measures order and suspended its activities in the disputed maritime area.[23] It added, however, that it would have been preferable if Ghana had responded to Côte d'Ivoire's request at an earlier stage. Secondly, the judgment pointed out that Ghana had undertaken activities only in the maritime area that was ultimately attributed to it, and that Côte d'Ivoire had claimed a violation of Article 83(3) of UNCLOS in the "Ivorian maritime area."[24] In other words, the judgment attached importance to the fact that Côte d'Ivoire had claimed a violation of the obligation in the Ivorian maritime area, rather than in the disputed maritime area. As a result of the maritime delimitation effected by the judgment, it was ultimately found that Ghana had not carried out activities in Côte d'Ivoire's waters, and thus there was no violation of the obligation of self-restraint within the scope of the submission by Côte d'Ivoire. It seems that this second point was decisive for the judgment in reaching its conclusion. In effect, the Special Chamber refrained from making substantive decisions concerning the obligation to exercise self-restraint in the entire disputed maritime area.[25]

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18 *Dispute Concerning Delimitation of the Maritime Boundary Between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, Judgment of 23 September 2017, para. 63.

19 *Dispute Concerning Delimitation of the Maritime Boundary Between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, Provisional Measures, Order of 25 April 2015, *ITLOS Reports 2015*, pp. 152–153 (para. 25) (https://www.itlos.org/en/cases/list-of-cases/case-no-23/case-no-23-provisional-measures/).

20 Ibid., p. 166 (para. 108). The Special Chamber indicated provisional measures to the effect that: a) Ghana shall ensure that no new drilling takes place in the disputed area; b) Ghana shall take all necessary steps to prevent information resulting from its exploration activities in the disputed area from being used to the detriment of Côte d'Ivoire; c) Ghana shall monitor all activities conducted by itself or with its authorization to ensure the prevention of serious harm to the maritime environment; d) both parties shall cooperate in taking all necessary measures to prevent serious harm to the marine environment in the disputed area; and e) both countries shall refrain from any unilateral action that might aggravate the dispute.

21 Ibid., pp. 163–164 (paras. 88–96).

22 Ibid., pp. 164–165 (paras. 99–102).

23 *Ghana/Côte d'Ivoire*, Judgment of 23 September 2017, para. 632.

24 Ibid., para. 633.

25 Nuwan Peiris, "Ghana v. Ivory Coast," *American Journal of International Law*, Vol. 112, No. 1 (2018), p. 92.

Nevertheless, the reference to Ghana's suspension of activities in the judgment deserves attention. It is not entirely clear in what sense this fact was given as a reason for the finding that there was no violation of Article 83(3).[26] In any event, however, if the Special Chamber had followed the standard adopted in the Guyana/Suriname case, the fact that Ghana later suspended drilling activities that would cause physical change to the marine environment could not have constituted a reason supporting its conclusion. To that extent, the judgment in the Ghana/Côte d'Ivoire can be regarded as having adopted a different approach from the one in Guyana/Suriname. A circumstance particular to the case was the fact that there was a certain accumulation of practice using the equidistance line as the boundary for exploration and exploitation of oil resources, and that a dispute concerning activities in the Ghanaian side of the equidistance line had surfaced relatively recently. (However, the argument of Ghana that mutual practice reflected a tacit agreement between the parties on the maritime boundary was not accepted by the Special Chamber.)[27] The focus on the "suspension" of the activities carried out in the disputed maritime area and not on factors such as the nature of the activities that were carried out, could be because consideration was given to the particular context of the dispute between the parties.

Judge Paik appended a separate opinion to the judgment. Judge Paik, while stating that the formulation of the submission of Côte d'Ivoire compelled him to support the judgment, considered the arguments on the obligation of self-restraint in detail.[28] According to Judge Paik, the obligation of self-restraint is a "result-oriented notion," and the key is whether the action in question would have the effect of endangering or impeding the reaching of a final agreement.[29] He maintains that, contrary to the approach adopted by the Guyana/Suriname award, what is permissible under Article 83(1) and what is not cannot be identified in general and in the abstract. Rather, Judge Paik considers it is necessary to take into account such factors as the type, nature, location, and the time of acts, as well as the manner in which they are carried out, and to decide in the framework of relations between the State concerned.[30] With regard to the case at hand, he concluded that there was a violation of the obligation of self-restraint by Ghana, as Ghana had continued to carry out highly invasive activities in the vicinity of the equidistance line, despite repeated protests by Côte d'Ivoire.[31]

(3) Assessment of the International Case Law

The two cases so far decided by international courts and tribunals, relating to the obligation of self-restraint, do not necessarily provide clear standards concerning the scope of the obligation. The Guyana/Suriname case indicated a test of physical change to the marine environment, and its decision that exploratory drilling and exploitation are not to be permitted is considered as

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[26] For a view that the reasoning is unconvincing, see Nigel Bankes, "ITLOS Judgment in the Maritime Boundary Dispute between Ghana and Côte d'Ivoire" (http://site.uit.no/jclos/files/2017/10/JCLOS-Blog_271017_ITLOS-Judgment-in-the-Maritime-Boundary-Dispute.pdf). Bankes points out that the obligation of self-restraint existed before and independently of the provisional measures order, and even if Ghana could put an end to its continued violation of the obligation of self-restraint by complying with the order, this does not mean that there was no proven breach before that time.

[27] It is also noteworthy that the judgment referred to the issue as whether there was a breach of the obligation of self-restraint "after realizing that that area was also claimed by Côte d'Ivoire." *Ghana/Côte d'Ivoire*, Judgment of 23 September 2017, para. 631.

[28] *Ghana/ Côte d'Ivoire*, Judgment of 23 September 2017, Separate Opinion of Judge Paik, para. 1.

[29] Ibid., para. 6.

[30] Ibid., para. 10.

[31] Ibid., para. 16.

providing important guidance on the matter.[32] However, the view that activities that do not cause physical change are generally permissible has not received support in subsequent discussions on this issue. It has been suggested in academic literature that a flexible approach taking into account the context of the relations between the States concerned may be necessary, and that it may be difficult to establish an absolute standard based on the nature of the activity in question.[33] As noted above, the reference to the suspension of existing exploitation activities in the judgment in the Ghana/Côte d'Ivoire case may be regarded as consistent with this kind of approach. That judgment also emphasized that the obligation of self-restraint is an obligation to make every effort not to jeopardize or hamper the reaching of a final agreement, "in a spirit of understanding and cooperation."[34] It could be argued that such an understanding of the obligation of self-restraint also implies that there are certain limits to categorical standards based on the nature of the activity in question.

The provisional measures order in the Ghana/Côte d'Ivoire case is also indicative of the limits of the approach, such as in the Guyana/Suriname award, that attempts to identify the scope of the obligation of self-restraint through an analogy with the jurisprudence on provisional measures. Since unilateral exploitation activities by Ghana resulted in permanent physical change to the seabed, this would be considered a violation of the obligation of self-restraint, if the standard in Guyana/Suriname was adopted. In light of this, concerns have been raised about the fact that the Special Chamber in the Ghana/Côte d'Ivoire case did not prescribe orders for existing exploratory drilling and resource exploitations, pointing out that there is a risk of *a fait accompli* being accomplished.[35] However, it could also be argued that the decision concerning provisional measures in the Ghana/Côte d'Ivoire case has simply demonstrated that decisions on provisional measures are made under different circumstances from those on the obligation of self-restraint in undelimited maritime areas. While no fundamental resolution of the situation is anticipated in the near future with respect to the obligation of self-restraint, provisional measures are prescribed only taking into account the need to preserve rights and prevent the exacerbation of the dispute until the judgment on the merits is rendered.[36] Thus, it may be time for a reassessment of the standard adopted in Guyana/Suriname, also from the viewpoint of the reasoning from which it was deduced.

One issue not addressed in either of these cases is the question of the geographical scope of the obligation of self-restraint. In both cases, the States concerned had clear claims regarding their maritime zones. However, in areas such as the East China Sea, where such clear-cut claims to maritime areas have not been made, the identification of a disputed area is in itself a difficult issue. If the obligation of self-restraint is considered applicable to the entire area of overlapping maritime entitlements, coastal States that make excessive maritime claims may be placed at an advantage. It has therefore been suggested that defining the geographical scope of the obligation of self-restraint may not be necessary, and that considerations should instead focus on the extent

[32] Kazuhiro Nakatani, "Kyōkai mikakutei kaiiki ni okeru ippōteki shigen kaihatsu to buryoku ni yoru ikaku—gaiana-surinamu chūsai hanketsu wo sankō toshite" [Unilateral resource development and the threat of force in undelimited maritime areas: A case study of the Guyana/Suriname arbitral award], in Shunji Yanai and Shinya Murase (eds.), *Kokusaihō no jissen—komatsu ichirō taishi tsuitou* [The Practice of International Law: in memory of Ambassador Ichirō Komatsu] (Shinzansha, 2015), p. 534.

[33] Anderson and Logchem, *supra* note 14, pp. 206–207; BIICL, *supra* note 14, pp. 24–25.

[34] *Ghana/Côte d'Ivoire*, Judgment of 23 September 2017, paras. 629–630.

[35] Yoshifumi Tanaka, "Unilateral Exploration and Exploitation of Natural Resources in Disputed Areas: A Note on the *Ghana/Côte d'Ivoire* Order of 25 April 2015 before the Special Chamber of ITLOS," *Ocean Development and International Law*, Vol. 46 (2015), pp.326–327.

[36] The separate opinion of Judge Paik in the Ghana/Côte d'Ivoire case also makes this point. *Ghana/Côte d'Ivoire*, Judgment of 23 September 2017, Separate Opinion of Judge Paik, paras. 8–9.

to which a unilateral activity jeopardizes or hampers the reaching of a final agreement.[37] However, this issue has not received adequate discussion in academic literature, making it difficult to consider the application of the obligation of self-restraint in the East China Sea.

2. Responses to Violations of the Obligation of Self-Restraint

In addition to the question of the kinds of unilateral activities that would constitute a violation of this obligation, another important question is the scope of permissible responses by a coastal State against a violation of the obligation of self-restraint by another State. Coastal States are at a risk of being placed at a disadvantage in the ultimate maritime boundary delimitation if they fail to respond to unilateral activities undertaken by another State, as this may be deemed tacit acceptance of the maritime claim of the latter. On the other hand, coastal States must ensure that their own responses do not violate the obligation of self-restraint, if they choose to take certain measures in response to a violation.

(1) Law Enforcement against Violations of the Obligation of Self-Restraint

In the Guyana/Suriname case, one of the main issues concerned the CGX Incident, in which a drilling rig operating under permission from Guyana was ordered to leave the area by the Surinamese navy. The Arbitral Tribunal, in addition to finding that Guyana's grant of permission for exploratory drilling constituted a violation of the obligation of self-restraint, decided that the order to leave issued by the Surinamese navy constituted a threat of force prohibited under Article 2(4) of the UN Charter, and also violated the obligation of self-restraint under UNCLOS.[38] In finding that Suriname had violated the obligation of self-restraint, the arbitral award specifically noted that Suriname had other peaceful options to address the issue, including negotiations and the use of the compulsory dispute settlement mechanism.[39] The finding by the Arbitral Tribunal in this case that the order to leave by the Surinamese navy constituted a threat of force in violation of Article 2(4) of the UN Charter has drawn some criticisms, sparking a debate concerning the conceptual distinction between the use of force in maritime law enforcement and under the UN Charter.[40] In relation to the obligation of self-restraint, it is not clear from the arbitral award itself whether law enforcement measures that do not constitute the threat or use of force would be found to constitute a breach, as the finding that Suriname had violated the obligation of self-restraint in this case was made in connection with the finding on the threat of force.

However, considering that law enforcement activities in undelimited maritime areas can raise tensions between the States concerned, the statement by the arbitral award in the Guyana/Suriname case that States should resort to peaceful means of dispute settlement should equally apply to law enforcement activities in general. On the other hand, some adopt the view that the obligation of self-restraint should not necessarily prohibit all law enforcement measures, for the reason that it is doubtful whether negotiations and dispute settlement procedures are sufficient measures to protect the interests of the coastal State after another States actually starts

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37 BIICL, *supra* note 14, pp. 29–31.

38 *Guyana/Suriname* Award, *supra* note 6, pp. 126, 138 (paras. 445, 483–484).

39 Ibid., p. 138 (para. 484).

40 Patricia Jimenez Kwast, "Maritime Law Enforcement and the Use of Force: Reflections on the Categorization of Forcible Action at Sea in the Light of the *Guyana/Suriname* Award," *Journal of Conflict and Security Law*, Vol. 13, No. 1 (2008), pp. 49–91; Tom Ruys, "The Meaning of 'Force' and the Boundaries of the *Jus ad Bellum*: Are 'Minimal' Uses of Force Excluded from UN Charter Article 2 (4)," *American Journal of International Law*, Vol. 108, No. 2 (2014), pp. 159–210.

conducting unilateral activities.[41] This question is linked to the issue of whether it is possible to utilize the compulsory dispute settlement procedure of UNCLOS for a violation of the obligation of self-restraint, which is discussed below. It has also been suggested that even if law enforcement activities in undelimited maritime areas would in general violate the obligation of self-restraint, they may be justified as countermeasures against the prior violation of the obligation by another State.[42] It would seem unequitable for a State to be placed at a disadvantageous position due to the mutual obligation of self-restraint, while another State engages in unilateral resource development. Thus, there might be room to consider that, under exceptional circumstances such as in case of urgency or where there is no other way to preserve its rights, States could respond by certain law enforcement measures without violating the obligation of self-restraint.

(2) The Possible Use of the Compulsory Dispute Settlement Mechanism

As discussed above, the arbitral award in the Guyana/Suriname case is of the view that an option for States is to resort to the dispute settlement mechanism under UNCLOS when disputes arise in undelimited maritime areas. However, Article 298(1)(a) of the Convention allows States to declare that they do not accept procedures with respect to "disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations," and therefore to remove themselves from the scope of the compulsory dispute settlement procedure for these kind of disputes. Of Japan's neighbors, Russia, the Republic of Korea and China have issued such declarations with respect to all categories of disputes provided under Article 298(1).[43] If disputes concerning the obligation of self-restraint, which is provided in Article 74(3) and 83(3), are considered to fall within the exception under Article 298(1)(a), disputes with these States concerning a violation of the obligation of self-restraint cannot be brought to the compulsory dispute settlement procedure under UNCLOS.

One view on this issue is that disputes concerning the obligation of self-restraint do not fall within the exception on disputes "relating to sea boundary delimitations," since the exception should not be interpreted in an unduly broad manner, considering that the general rule of UNCLOS is to subject disputes concerning its interpretation and application to the compulsory dispute settlement procedure.[44] However, the fact that Article 298(1)(a) provides an exception should not necessarily warrant a narrow reading. A better approach is to consider the intended scope of the exception on the basis of the treaty provision itself.

That being said, the text of Article 298(1)(a), which should provide the starting point for this discussion, is ambiguous as to its purpose. It is unclear whether the intent was simply to allow exclusion of "disputes concerning the interpretation or application of articles 15, 74 and 83," with the phrase "relating to sea boundary delimitations" merely explaining the content of the referenced articles, or rather, to specifically limit the exclusion to disputes "relating

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41 Irini Papanicolopulu, "Enforcement Action in Contested Waters: The Legal Regime," 6th IHO-IAG ABLOS Conference, *Contentious Issues in UNCLOS—Surely Not?*, Monaco, 25–27 October, 2010, p. 4 (https://www.iho.int/mtg_docs/com_wg/ABLOS/ABLOS_Conf6/S7P2-P.pdf)

42 BIICL, *supra* note 14, p. 116, 172; Sōji Yamamoto, "Kyōkai mikakutei kaiiki ni okeru hōshikkō sōchi no haikei to genkai" [The Context and Limits to Law Enforcement Measures in Undelimited Maritime Areas], *Kaiyōhō no shikkō to tekiyō wo meguru kokusai funsō jirei kenkyū* [Case Studies of International Disputes Concerning the Enforcement and Application of the Law of the Sea] (Kaizyō hoantaisei tyōsa kenkyū iinkai hōkokusyo [Report of the Research Committee on the Regime of Maritime Security]) (Japan Coast Guard Foundation, 2008), p. 113.

43 Russian Federation: Declaration made upon ratification, *Law of the Sea Bulletin*, No. 34 (1997), p. 9; Republic of Korea: Declaration pursuant to Article 298, 18 April 2006, Ibid., No. 61 (2006), p. 14; China: Declaration under Article 298, 25 August 2006, Ibid., No. 62 (2006), p. 14.

44 Nakatani, *supra* note 32, p. 534.

to sea boundary delimitations" within the broader category of "disputes concerning the interpretation or application of articles 15, 74 and 83."[45] As a matter of textual interpretation, the former interpretation seems more straightforward. This was the interpretation adopted in the decision on competence in the compulsory conciliation proceedings between Timor-Leste and Australia concerning the Timor Sea in 2016.[46] According to this position, disputes concerning the obligation of self-restraint are not subject to compulsory dispute settlement procedures, because disputes concerning paragraph 3 of Articles 74 and 83 which provide the obligation of self-restraint would clearly fall within "disputes concerning … articles 15, 74 and 83," which are excluded by Article 298(1)(a).

However, the decision by the conciliation commission was not supported by detailed reasoning, and the matter may still be considered open for further discussion. It is understood that the reason for having a system of optional exceptions in the first place is that some disputes were considered politically sensitive to be entrusted to the compulsory dispute settlement procedure.[47] Article 298(1)(a), in particular, reflects the political and economic importance of maritime boundary delimitation, as a process for determining the scope of the power of coastal States.[48] It is possible to argue that this rationale for allowing optional exceptions does not apply with respect to disputes concerning the obligation of self-restraint, as the dispute would have no bearing on the standards or methods for boundary delimitation itself.[49] However, it could alternatively be argued that disputes concerning the obligation of self-restraint cannot always be considered in complete isolation from the standards and methods for the final maritime delimitation, as the plausibility of the rights may have to be taken into account in finding a violation of the obligation of self-restraint.

Conclusions

In academic circles, discussions are still ongoing about the scope of unilateral activities that can be carried out by coastal States without violating the obligation of self-restraint in undelimited maritime areas, and the measures that can be taken by coastal States against unilateral activities that violate the obligation of self-restraint. A consistent standard has not yet been developed in the jurisprudence of international courts and tribunals. The arbitral award in the Guyana/Suriname case did establish a seemingly clear-cut standard concerning the limits of unilateral activities. However, the limits to making categorical determinations based on the nature of the activity have come to be recognized as a result of the subsequent academic debates and the judgment in the

45 Van Logchem, *supra* note 5, p. 195.

46 In the Matter of a Conciliation before a Conciliation Commission Constituted under Annex V to the United Nations Convention on the Law of the Sea between the Democratic Republic of Timor-Leste and the Commonwealth of Australia, Decision on Australia's Objections to Competence (19 September 2016), paras. 93–97. This case was a compulsory conciliation case under UNCLOS Annex V, which can be initiated at the request of a party, when a dispute that fall under the optional exception in Article 298(1)(a) "arises subsequent to the entry into force of this Convention and where no agreement within a reasonable period of time is reached in negotiations between the parties." On the decision of the conciliation commission on its competence, see Dai Tamada, "Kokuren kaiyōhō jōyaku fuzokusho V chōtei jiken (higashi chimōru/ōsutoraria) kengen kōben ni kansuru kettei (2016 nen 9 gatsu 19 nichi)" [UNCLOS Annex V conciliation case (Timor-Leste/Australia), Decision on Objections to Competence (19 September 2016)], *Kobe hōgaku zasshi* [Kobe Law Journal], Vol. 66, No. 3–4 (2017), pp. 119–134.

47 Proelss, *supra* note 4, p. 1921.

48 Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (Cambridge University Press, 2005), p. 257.

49 Yumi Nishimura, "Kaiyō funsō no kaiketsu tetsuzuki to hō no shihai" [Dispute settlement procedures concerning maritime disputes and the rule of law], *Kokusai Mondai* [International Affairs], No. 666 (2017), p. 42.

more recent Ghana/Côte d'Ivoire case.

In the developments after the Guyana/Suriname case, the obligation of self-restraint is increasingly viewed as an obligation not limited to refraining from certain specific types of activities that could be identified in general and in the abstract. This is a useful point of reference in examining the current situation in the East China Sea. For example, by restricting its resource development in the East China Sea to the Chinese side of the equidistance line, China may be acting in the belief that it is in compliance with the obligation of self-restraint by simply doing so. However, notwithstanding the possible differences of interpretation concerning the geographical scope of the obligation of self-restraint, the fact that China has continued to pursue unilateral development, despite the understanding on joint development that was reached in June 2008, takes on added significance in the context of Japan-China relations in the East China Sea.[50] On the other hand, it is also important for Japan to reassess whether activities conducted on the Japanese side of the equidistance line would not have the effect of jeopardizing or hampering the reaching of a final agreement based on "the spirit of understanding and cooperation."

It is difficult to provide any concrete conclusions on the prospect of Japan initiating proceedings against China using the dispute settlement mechanism under UNCLOS, with the claim that the unilateral resource development activities by China violate the obligation of self-restraint. As discussed above, precedents and academic discussions on this point are limited, making it difficult to draw any concrete conclusions. However, it would seem that a plausible case could be made in favor of the interpretation that Article 298(1)(a) does not exclude disputes concerning a violation of the obligation of self-restraint from the compulsory dispute settlement procedure. As such, this option should not necessarily be ruled out. On the other hand, the question of whether invoking the dispute settlement mechanism could contribute to the resolution of the dispute in reality is an issue that must be seriously considered on its own merits.[51]

[50] Ministry of Foreign Affairs of Japan, "Japan-China Joint Press Statement Cooperation between Japan and China in the East China Sea" (https://www.mofa.go.jp/files/000091726.pdf).

[51] On this point, see Nishimura, *supra* note 49, pp. 41–45.